No. 2768

United States

Circuit Court of Appeals

For the Ninth Circuit.

CRANE COMPANY, a Corporation,

Appellant,

vs.

FIDELITY TRUST COMPANY, Trustee, a Corporation, and WASHINGTON-OREGON CORPORATION, INDEPENDENT ELECTRIC COMPANY, a Corporation, and WILLIS D. HOAG,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Solicitors.

MAURICE W. SEITZ, Esquire, #1033 Northwestern Building, Portland, Oregon,
Solicitor for the Appellant.

RANDOLPH W. CHILDS, Esquire, #617 Tacoma Bldg., Tacoma, Washington;

MAURICE A. LANGHORNE, Esquire, #617 Tacoma Bldg., Tacoma, Washington; and

FREDERIC D. METZGER, Esquire, #617 Tacoma Bldg., Tacoma, Washington,
Solicitors for Appellees. [1*]

In the District Court of the United States for the Western District of Washington, Southern Division.

No. 15—E.

FIDELITY TRUST COMPANY, Trustee, a Corporation,

Claimant,

vs.

WASHINGTON-OREGON CORPORATION, INDEPENDENT ELECTRIC COMPANY, a Corporation, and WILLIS D. HOAG,

Respondents,

and

CRANE CO., a Corporation,

Intervenor.

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*Page-number appearing at foot of page of original certified Record.

Stipulation (as to Record on Appeal).

IT IS HEREBY STIPULATED by and between the parties hereto, by their respective attorneys of record, that the clerk of the above-entitled court may prepare a certificate to constitute the record on appeal in the above case, the following papers and documents, omitting all captions, endorsements, verifications, acceptances of service, etc., the record to be printed in San Francisco, California:

1. Amended and supplemental bill of complaint, omitting exhibits.
2. Answer of Washington-Oregon Corporation.
3. Order permitting Crane Co. to file its intervening petition herein.
4. Order permitting Crane Co. to file its amended petition of intervention, herein.
5. Amended petition of intervention of Crane Co.
6. Answer of complainant and respondent to original petition of intervention.
7. Stipulation to the effect that the answer to the original petition of intervention should stand as the answer to the amended petition of intervention. **[2]**
8. Original stipulation filed November 8th, 1915.
9. Supplemental stipulation of facts filed herein on the 8th day of November, 1915.
10. Judge's decision.
11. Judgment and decree.
12. Petition for appeal.
13. Order allowing appeal.

14. Bond on appeal.
15. Assignments of error.
16. Stipulation as to original exhibits, etc.

IT IS, HOWEVER, AGREED, that neither party is precluded by this stipulation from causing the certification as part of the record on appeal of any additional matter now on the record.

Dated this 13th day of March, 1916.

RANDOLPH L. CHILDS,
HAYDEN, LANGHORNE & METZGER,
Attorneys for Complainant.
MAURICE W. SEITZ,
Attorneys for Crane Co.

(Filed Mar. 14, 1916.) **[3]**

Amended and Supplemental Bill of Complaint.

To the Honorable, the Judges of the District Court of the United States for the Western District of Washington, Sitting in Equity:

Fidelity Trust Company, Trustee under the mortgage hereinafter referred to, a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania, brings this, its Amended and Supplemental Bill of Complaint, against Washington-Oregon Corporation, a corporation organized and existing under and by virtue of the laws of the State of Washington, C. E. Cook, a resident and citizen of the State of Washington, Joseph Smith, a resident and citizen of the State of Washington, John Kesser, a resident and citizen of the State of Washington, Robert Jeffrey, a resident and citizen of the State of

Washington, and Willis D. Hoag, a resident and citizen of the [4] State of Oregon, and thereupon your orator complains and says:

First. That on and prior to the first day of April, 1911, the defendant, Washington-Oregon Corporation, was and still is a corporation duly organized and existing under the laws of the State of Washington, and a resident and citizen of the State of Washington, and that Washington-Oregon Corporation then was and still is duly authorized under the laws of the States of Oregon and Washington to construct, own, maintain and operate the property and premises hereinafter mentioned, and to make, execute and deliver the mortgage hereinafter sought to be foreclosed, and to make, deliver and issue the bonds therein referred to.

Second. That your orator, Fidelity Trust Company, at all times hereinafter mentioned was, and still is, a corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania, and that it is a resident and citizen of the State of Pennsylvania, and an inhabitant of the Eastern District thereof within the meaning of the laws determining the jurisdiction of this Honorable Court, and that at all times hereinafter mentioned, it was, and now is duly authorized and empowered under the terms of its charter, to take and hold in trust the property transferred and conveyed to it in trust as hereinafter stated, and to execute and perform the trust upon it imposed under and by virtue of the mortgage or deed of trust hereinafter described.

Third. That C. E. Cook at all times hereinafter mentioned was, and still is, a resident and citizen of the State of Washington.

Fourth. That Joseph Smith at all times hereinafter mentioned was, and still is, a resident and citizen of the State of Washington.

Fifth. That John Kesser at all times hereinafter mentioned was, and still is, a resident and citizen of the State of Washington.

Sixth. That Robert Jeffrey at all times hereinafter mentioned was, and still is, a resident and citizen of the State of Washington. [5]

Seventh. That Willis D. Hoag at all times hereafter mentioned was, and still is, a resident and citizen of the State of Oregon.

Eighth. That heretofore and prior to the nineteenth of May, 1911, the defendant, Washington-Oregon Corporation, in the exercise of its powers under the laws of the States of Washington and Oregon, and in accordance with resolutions duly passed by its board of trustees and by its stockholders at respective meetings thereof duly called and held, which said resolutions of its stockholders were duly concurred in by the vote in person or by proxy of holders of more than two-thirds of the par value of the issued capital stock of Washington-Oregon Corporation, duly authorized the execution and delivery by the proper officers of Washington-Oregon Corporation of negotiable bonds in the amount of $5,000,000 par value, dated the first day of April, 1911, and payable at the office of your

orator, as trustee, in the city of Philadelphia, State of Pennsylvania, on the first day of April, 1936, in gold coin of the United States of America, of or equivalent to the present standard of weight and fineness, or at the option of the company on any semi-annual interest day before maturity by payment of the principal sum due thereon, with five per centum thereof additional and accrued interest; said bonds to bear interest at the rate of six per centum per annum; payable in like gold coin or its equivalent semi-annually on the first days of April and October of each year at the office of your orator, and without deducting from either principal or interest of any tax which might by any future or then existing laws of the United States, or of the State of Washington, be imposed thereon; said bonds to be for such denomination or par value, and in such form consistent with the terms of the mortgage or deed of trust hereinafter referred to, as at the time of the issue thereof the board of trustees of the Washington-Oregon Corporation should prescribe; the $1,500,000 of said bonds which, as therein provided, should be issued forthwith, to be coupon bonds of the denomination of $1,000, numbered consecutively from one [6] upwards, and coupon bonds of the denomination of $500, numbered from A–1 upwards; said bonds aggregating $1,500,000 to be certified by your orator, as trustee, and by it delivered to or upon the order in writing of the president, vice-president or treasurer of Washington-Oregon Corporation, or such other persons as the board of trustees might direct, upon the execution, delivery and recording of the mort-

gage or deed of trust hereinafter referred to; the balance of said bonds aggregating $3,500,000 par value, to be retained by Washington-Oregon Corporation, and when, from time to time, and in such amounts as should be required for the purpose of redeeming the outstanding bonded indebtedness on the property of Washington-Oregon Corporation and in order to provide for construction, equipment, betterments, improvements, additions to the plant and property of the Washington-Oregon Corporation then owned or thereafter to be acquired, when made and to be made, and for the acquisition of any property, real or personal, or franchises, which Washington-Oregon Corporation was legally authorized and empowered to own, lease and operate for any of said purposes, and for other corporate purposes, the said $3,500,000 par value of bonds were to be delivered to your orator and by your orator certified and delivered to Washington-Oregon Corporation, upon resolution of the Board of Trustees of said Washington-Oregon Corporation, subject to the limitations in said mortgage contained.

Ninth. That on or about the nineteenth day of May, 1911, being thereunto duly authorized by the laws of the States of Washington and Oregon, and by resolutions duly passed by the board of trustees and by the stockholders of Washington-Oregon corporation at respective meetings thereof duly called and held, which said resolutions of its stockholders were duly concurred in by the vote in person or by proxy of holders of more than two-thirds of the par value

of the issued capital stock of Washington-Oregon Corporation, the defendant, Washington-Oregon Corporation, duly made, executed and delivered to your orator as trustee its said mortgage or deed of trust dated the first day of April, 1911, wherein and whereby, in order to secure the payment of the [7] principal and interest of all such bonds at any time issued and outstanding and to secure the performance and observance of all the covenants and conditions in said mortgage contained, it granted, bargained, sold, released, conveyed, assigned, transferred, and set over unto your orator as trustee, its successors and assigns forever, all the property described in paragraphs of said mortgage numbered "First" to "One Hundred and Twenty-fourth," inclusive, together with all its property, real or personal, rights, privileges and franchises of every kind and nature whatsoever, and the rents, issues and profits thereof, then owned or thereafter to be acquired by it; to have and to hold all of the property described in said mortgage unto your orator, as trustee, and its successors and assigns forever, in trust, to secure the payment equitably and ratably, without preference or priority of one kind over another of said bonds. A true copy of said mortgage is annexed to this Bill of Complaint as a part hereof, marked exhibit "A," which your orator prays may be taken in all respects as if fully set forth in the body of this Amended and Supplemental Bill.

Tenth. That said mortgage was duly authorized, made, executed and delivered in all respects in con-

formity with law, and your orator duly accepted the trust created by and in said mortgage which was duly filed for record as a real and chattel mortgage in all the counties of said States of Washington and Oregon in which the property pledged by said mortgage was situated, to wit: In the office of the Recorder of Conveyances in and for the county of Columbia, State of Oregon, on the twenty-sixth day of May, 1911, at 9:30 o'clock in the forenoon thereof, and recorded in the Records of Mortgages of Real Property in Book R thereof, at page 547, and indexed in the general index of mortgages of personal property or chattel mortgages, as well as in the general index of mortgages of real property; in the office of the Recorder of Conveyances in and for the county of Washington, State of Oregon, on the twenty-sixth day of May, 1911, at [8] 3:15 o'clock in the afternoon of said day, and recorded in the Records of Mortgages of Real Property in said office in Book 61 thereof, at page 500, and indexed in the general index of mortgages of personal property or chattel mortgages, as well as in the general index of mortgages of real property; in the office of the county auditor of the county of Clark in and for the State of Washington, on the twenty-sixth day of May, 1911, at 4.20 o'clock in the afternoon of said day, and recorded in said office in the Records of Mortgages of Real Property, in Book 89 thereof, at page 302, and in the Records of Mortgages of Personal Property in Book G thereof, at page 217, a duplicate original of said mortgage being filed in a file kept in said office in accordance with the provisions of Section

8782 of Remington & Ballinger's Annotated Codes and Statutes of Washington; in the office of the county auditor in and for the county of Cowlitz in the State of Washington on the twenty-sixth day of May, 1911, at nine o'clock in the forenoon of said day and recorded in the Records of Mortgages of Real Property in Book 53 thereof, at page 120, and in the Records of Mortgages of Personal Property, in Book 16 thereof, at page 410, a duplicate original of said instrument being filed in a file kept in said office in accordance with the provisions of Section 8782 of Remington & Ballinger's Annotated Codes and Statutes of Washington; in the office of the county auditor of the county of Lewis, in the State of Washington, on the twenty-sixth day of May, 1911, at 3:15 o'clock in the afternoon of said day and recorded in said office in the Records of Mortgages of Real Property, in Book 70 thereof, at page 1, and in the Records of Mortgages of Personal Property in Book 9 thereof, at page 161, a duplicate of original of said instrument being filed in a file kept in said office in accordance with the provisions of Section 8782 of Remington & Ballinger's Annotated Codes and Statutes of Washington; and in the office of the county auditor of the county of Thurston, in and for the State of Washington, on the twenty-first day of August, 1911, at 4:25 o'clock in the afternoon of said day, in the Records of Mortgages of Real Property in Book 6 thereof, at page 321. **[9]**

Eleventh. Upon information and belief that forthwith upon the execution, delivery and recording said mortgage Washington-Oregon Corporation duly

executed bonds of the issue described in said mortgage of the aggregate par value of principal of $1,500,000, all of which bonds were duly certified by your orator in all respects as provided in said mortgage, and as so authenticated were duly issued and delivered by your orator in the manner provided in and by said mortgage. Upon information and belief that in or about the month of October, 1911, pursuant to the provisions of Article I of said mortgage, and pursuant to a duly executed order in writing of the treasurer of Washington-Oregon Corporation, stating the amount of bonds required, to wit, bonds of the par value of principal of $200,000, and the purpose for which the same were required, to wit, in order to provide funds for the acquisition of certain property, for the construction of certain machinery and lines, and for future extensions, improvements and betterments to the property of Washington-Oregon Corporation then owned or thereafter to be acquired, and upon the delivery to your orator of a certified copy of a resolution of the board of trustees of Washington-Oregon Corporation duly passed at a meeting of its board of trustees at a meeting thereof duly called and held, authorizing the execution and delivery of such certificate, together with a sworn statement of the president or vice-president of Washington-Oregon Corporation that said bonds or the proceeds thereof were to be used for the purposes therein set forth, your orator duly certified and delivered to Washington-Oregon Corporation bonds of the par value of principal of $200,000. All of which

said bonds, aggregating in par value one million seven hundred thousand dollars ($1,700,000), with the exception of bonds of the par value of $5,500, which are retained by Washington-Oregon Corporation, and bonds of the par value of $131,000, which were duly retired by Washington-Oregon Corporation, in accordance with the provisions of said mortgage, are now outstanding, and your orator is informed and believes, and therefore avers, that said **[10]** bonds so issued and delivered, and all of them, to wit, bonds of the par value of principal of $1,563,-500, have been duly issued, negotiated and sold to divers persons who have thereby become bona fide holders thereof as purchasers of the same for value, and that all of said bonds are now, and since and prior to April 1st, 1914, have been outstanding, valid, binding and subsisting obligations of Washington-Oregon Corporation.

Twelfth. Your orator further alleges upon information and belief that subsequent to the execution, delivery and recording of said mortgage as aforesaid and prior to the commencement of this suit Washington-Oregon Corporation acquired in addition to the property owned by said corporation at the time of the execution of said mortgage, by several deeds under seal within such times duly executed and delivered to Washington-Oregon Corporation and, except as in "Schedule B" otherwise stated, within such times duly recorded in the proper offices in the several counties wherein the property conveyed by said respective deeds was situated, certain property, a description whereof, so far as known to your orator,

is contained in a certain schedule, marked exhibit "B," which is annexed to this Amended and Supplemental Bill of Complaint and made a part hereof, and during said times Washington-Oregon Corporation may have acquired other additional property, the description whereof is unknown to your orator.

Thirteenth. Your orator further alleges upon information and belief that subsequent to the execution, delivery and recording of said mortgage, and subsequent to the commencement of this suit, Washington-Oregon Corporation acquired in addition to the property owned by said corporation at the time of the execution of said mortgage and in addition to the property described in said exhibit "B," by a deed under seal heretofore duly executed and delivered to Washington-Oregon Corporation and heretofore duly recorded in the proper offices in the several counties wherein the property conveyed by said deed was situated, certain property, a description whereof [11] is contained in a certain Schedule, marked exhibit "C," which is annexed to this Amended and Supplemental Bill of Complaint and made a part hereof.

Fourteenth. Your orator further alleges upon information and belief that subsequent to the execution, delivery and recording of said mortgage and prior to the commencement of this suit and pursuant to the provisions contained in Article II of said mortgage, your orator, by an instrument in writing under seal duly made and delivered, duly released from the operation and effect of said mortgage or there was disposed of by Washington-Oregon Cor-

poration, the property described in a certain schedule marked exhibit "D," which is annexed to this Amended and Supplemental Bill of Complaint and made a part hereof.

Fifteenth. That subsequent to the execution and recording of said mortgage and prior to the commencement of this suit the city of Centralia duly acquired, free from all incumbrances, the property described in a certain schedule, marked exhibit "E," which is annexed to this Amended and Supplemental Bill of Complaint and made a part hereof, which said last-mentioned property was thereupon duly released from the operation and effect of said mortgage.

Sixteenth. That on the first day of April, 1914, Washington-Oregon Corporation made default, in the payment of the installment of interest due on that day on all of said bonds issued and outstanding and secured by said mortgage as aforesaid; that Washington-Oregon Corporation has not provided any fund with which to pay the said installment of interest or any part thereof, and that the whole of said installment of interest remains due and unpaid.

Seventeenth. That pursuant to the provisions of Article VII of said mortgage the holders of a majority in value of the outstanding bonds secured by said mortgage on or about the twentieth day of July, 1914, duly elected and duly notified in writing Washington-Oregon Corporation and your orator that they elected that the whole principal of all bonds secured by said mortgage should forthwith be declared in writing by your orator to be and should

immediately become due and payable, and thereupon and on or about the twentieth day of July, 1914, your orator duly declared in writing and notified Washington-Oregon Corporation that the whole principal of all the bonds secured by said mortgage was forthwith due and payable.

Eighteenth. That on or about the twentieth day of July, [12] 1914, in accordance with the provisions of Article VII of said mortgage the holders of a majority in value of the outstanding bonds secured by said mortgage duly requested your orator, by an instrument in writing signed by them, to enforce their rights under said mortgage and to institute proceedings for the foreclosure of the property mortgaged and pledged to your orator by said mortgage.

Nineteenth. That each of the defendants, Washington-Oregon Corporation, C. F. Cook, Joseph Smith, John Kesser, Robert Jeffrey and Willis D. Hoag and the intervenor, Philadelphia Trust Safe Deposit & Insurance Company has or claims to have some interest or lien in the property or a part thereof, pledged by said mortgage, which interest, if any, is subsequent and subordinate to the lien of said mortgage.

Twentieth. That is is provided in Article X of said mortgage that upon the filing of the bill in equity or commencement of other judicial proceedings to enforce the rights of your orator as trustee and of the bondholders under said mortgage, your orator shall be entitled to the appointment of a receiver or receivers of the property pledged by said mort-

gage and of the tolls, earnings, income, rents, issues and profits thereof pending such proceedings with such powers as the Court making such appointment shall confer.

Twenty-first. Your orator alleges that on or about the 31st day of July, 1914, your orator duly filed in this court its bill of complaint herein.

Twenty-second. Your orator alleges that on or about the 31st day of July, 1914, the Honorable Edward E. Cushman, one of the judges of the District Court of the United States in and for the Western District of Washington, duly signed an order, which was on said last-mentioned day duly filed and entered in this Court, appointing Elmer M. Hayden temporary receiver of all of the property of Washington-Oregon Corporation covered by said mortgage **[13]** situated in the States of Washington and Oregon, a copy of which last-mentioned order marked exhibit "F" is annexed to this Amended and Supplemental Bill of Complaint; that a certified copy of said last-mentioned order was duly served on defendant Washington-Oregon Corporation on or about the 1st day of August, 1914; that on or about the 31st day of July, 1914, said Elmer M. Hayden duly executed a bond, with good and sufficient surety duly approved by said Honorable Edward E. Cushman, in the sum of $25,000 in accordance with the terms of said last-mentioned order. That said Elmer M. Hayden forthwith took possession of said property as temporary receiver and ever since has held possession thereof as temporary receiver pursuant to said order

and pursuant to the order referred to in paragraph Twenty-fifth hereof.

Twenty-third. Your orator alleges upon information and belief that at the time of the filing of said Bill of Complaint Washington-Oregon Corporation was insolvent; that Washington-Oregon Corporation defaulted in the payment of taxes upon its property for the year 1913, in an amount exceeding $25,000, and that it was necessary for your orator, under the provisions of said mortgage, to pay said taxes together with the accrued interest and penalties thereon, said payments aggregating the sum of $25,902.68, whereof $5,319.50 was paid on June 10th, 1914, and whereof $20,583.18 was paid on July 13, 1914, in order to prevent sales of property of Washington-Oregon Corporation by the sheriffs of the respective counties, in which such taxes were assessed and imposed, and in which said property was situated; that Washington-Oregon Corporation made default in the payment of the installment of interest due on July 1st, 1914, upon the principal amounting to $350,000, secured by a certain mortgage made by Twin City Light and Traction Company to Standard Trust Company, of New York, as trustee, which last-mentioned mortgage is more particularly [14] described in said mortgage to your orator, said installment of interest amounting to the sum of $10,500; that Washington-Oregon Corporation defaulted in the payment of the installment of interest due April 1st, 1914, upon the principal amounting to $400,000, secured by a certain mortgage made by Washington-

Oregon Corporation to the Philadelphia Trust, Safe Deposit & Insurance Company, as trustee, dated the first day of April, 1913, and duly recorded in the proper offices in the counties of Washington and Oregon where the property described in said last-mentioned mortgage was situated, said installment of interest amounting to the sum of $12,000; that Washington-Oregon Corporation defaulted in the payment of accounts due and payable exceeding the sum of $50,000.

Twenty-fourth. Your orator alleges that on or about the 8th day of August, 1914, a duly certified copy of said Bill of Complaint and of said last-mentioned order was duly filed and entered in the United States District Court for the District of Oregon.

Twenty-fifth. Your orator alleges that on or about the 17th day of August, 1914, the Honorable Edward E. Cushman, one of the judges of the United States District Court in and for the Western District of Washington, duly signed an order, which was on or about said last-mentioned day duly filed and entered in this court continuing said Elmer M. Hayden as temporary receiver of all of the property of Washington-Oregon Corporation covered by said mortgage situated in the States of Washington and Oregon, until the further order of said last-mentioned court, with the same powers and authority conferred by said order of July 31st, 1914.

Twenty-sixth. Your orator further alleges that heretofore and on or subsequent to the 17th day of August, 1914, the following persons and corpora-

tions have by several orders filed in this court intervened in this suit: John Kiernan, C. E. Moulton, E. W. [15] Haines, A. Welch, W. J. Patterson, F. W. Effinger, William Pollman, J. H. Elwell, The Vancouver Townsite Company, John H. Norris, John W. Sifton, H. A. Moore, Pacific States Fire Insurance Company, Hannah N. Price, L. M. Hidden, E. M. Rands, M. M. Connor, A. B. Eastham, Ashley & Rumelin, a corporation, Jack Veness. Philadelphia Trust, Safe Deposit & Insurance Company, Portland Wood Pipe Company, B. K. Knapp, Portland Iron Works, Western Electric Company, John A. Roeblings Sons Company, Crane Company, Monarch Coal Company.

Twenty-seventh. Your orator further shows that except as stated in paragraphs "twenty-first" to "twenty-sixth" hereof inclusive, no proceedings at law or in equity have been begun or commenced by your orator, or, as your orator is informed and believes, by any holder of any of the bonds secured by said mortgage, or of any coupon thereto annexed, to enforce the payment of the sums so covenanted to be paid by Washington-Oregon Corporation under the terms of said mortgage, and that the amount of the controversy in this suit exceeds $3,000 exclusive of interest and costs.

WHEREFORE and forasmuch as your orator is remediless in the premises according to the strict rules of common law and can have relief only in a court of equity where matters of this kind are properly cognizable your orator prays equitable relief, as follows:

1. That said defendants, Washington-Oregon Corporation, Willis D. Hoag, C. E. Cook, Joseph Smith, John Kesser and Robert Jeffrey, may be required to make answer respectively unto all and singular the matters hereinbefore stated and charged as fully and as particularly as if they were herein expressly and particularly interrogated concerning the same, but not under oath, answer under oath being hereby expressly waived. [16]

2. That a decree be made directing that all properties real and personal, acquired by or on behalf of Washington-Oregon Corporation since the recording of said mortgage shall be taken to be subject to the lien and remedies provided for by such mortgage as fully and completely as though particularly described therein.

3. That a decree be made that the lien of said mortgage be established as a lien upon all the premises, franchises and other property, real and personal in said mortgage described; that said mortgage is a lien upon all property, real and personal, acquired by Washington-Oregon Corporation since the recording of said mortgage, whether hereinbefore described or otherwise, superior to the claim, if any, of each and all of the defendants and of the intervenor Philadelphia Trust, Safe Deposit & Insurance Company and of all other claims, liens and encumbrances created subsequent to the recording of said mortgage and that the rights of all holders of bonds issued under said mortgage, in any and all the property, real and personal, of Washington-Oregon Corpora-

tion, mortgaged to secure the same, may be ascertained.

4. That a decree be made fixing the amount due upon said mortgage bonds outstanding, principal and interest secured by said mortgage, and of the expenses, compensation and fees of the trustee and its solicitors and counsel.

5. That a decree be made that the defendant Washington-Oregon Corporation, do pay what shall appear to be due upon the ascertainment of all principal and interest unpaid upon said bonds and all expenses, compensation and fees of your orator as trustee and of its solicitors and counsel before the actual sale of the mortgaged premises under such decree, together with said sums aggregating $25,902.68 expended by your orator for the payment of taxes as aforesaid, and interest thereon at five per cent per annum. [17]

6. That a decree be made that in case the amount thus ascertained to be due as principal and interest upon the bonds outstanding and secured by said mortgage and for expenses, compensation and fees and for the payment of taxes and interest as aforesaid shall not be paid to your orator within the time to be limited by decree of your Honorable Court, the defendants, Washington-Oregon Corporation, C. E. Cook, Joseph Smith, John Kesser, Robert Jeffrey and Willis D. Hoag, and the intervenor Philadelphia Trust, Safe Deposit & Insurance Company, and all persons claiming under them or any of them any interest in said mortgaged property, and that all per-

sons making claims as supply creditors or otherwise, to priority over said mortgage and all persons claiming under them or any of them, be absolutely barred and foreclosed of every right or equity of redemption of, in and to the property conveyed by said mortgage or since acquired by or on behalf of Washington-Oregon Corporation and now held under said mortgage, and that a sale of the whole of the mortgaged property in one lot or parcel and without any right of redemption be ordered in accordance with the law and practice of this Honorable Court, and that the proceeds of such sale may be applied; first, to the expenses of this suit and the compensation and disbursements of your orator as trustee in the execution of its trusts, the compensation of its solicitors and counsel; next to the payment to your orator of said amounts expended by your orator for the payment of taxes as aforesaid with interest thereon from the time of such payments; next, to the payment of the amounts found to be due and unpaid upon the bonds outstanding and secured by said mortgage, and the balance, if any, as the court may direct.

7. That a decree be made that if the proceeds of sale shall be insufficient for the payment of such expenses, compensation and fees and costs of sale, said amounts expended for the payment of [18] taxes and all of the principal and interest of said outstanding bonds issued under said mortgage as aforesaid, the defendant, Washington-Oregon Corporation may be adjudged to pay any deficiency thereof.

8. That a decree be made that at said sale the purchase money may be paid either in cash or by owners of bonds secured by said mortgage in bonds to such extent as said bonds shall be entitled to payment in cash out of the proceeds of sale.

9. That pending this suit a writ of injunction may be issued out of and under the seal of this Honorable Court directing, enjoining and restraining the said defendant, Washington-Oregon Corporation, its officers, agents and all other persons whomsoever from interfering with, transferring, selling or disposing of any of the property secured by said mortgage.

10. That an order or decree be made appointing a receiver with the usual powers of receivers in like cases of the property pledged by said mortgage, and of the tolls, earnings, income, rents, issues and profits thereof, and to preserve and operate said property and to collect such tolls, earnings, income, rents, issues and profits pending the sale thereof pursuant to the decree of this Honorable Court, and to hold and dispose of such tolls, earnings, income, rents, issues and profits as this Honorable Court may direct.

11. That your orator may have such other and further relief as to this Honorable Court shall seem just.

May it please your Honors to grant unto your orator not only a writ of injunction conformable to the prayer of this Amended and Supplemental Bill of Complaint to be issued to said Washington-Oregon Corporation, but also a writ of subpoena directed to

said defendants, Washington-Oregon Corporation, C. E. Cook, Joseph Smith, John Kesser, Robert Jeffrey and Willis D. Hoag, commanding them and [19] each of them at a certain time and under a certain penalty to be therein specified, to be and appear before this Honorable Court then and there to answer the premises and to abide by the order and decree of the Court herein and that they may appear herein according to law.

FIDELITY TRUST COMPANY.
By RANDOLPH W. CHILDS,
Solicitor.

RANDOLPH W. CHILDS,
Solicitors for Complainant.

(Verified.)
Filed Nov. 9, 1914. [20]

Answer of Defendant Washington-Oregon Corporation, to Amended Bill.

Comes now the Washington-Oregon Corporation, one of the defendants above named, and makes the following answer to the amended and supplemental bill of complaint herein:

I.

This defendant admits all and singular the allegations of the amended and supplemental bill of complaint herein.

WHEREFORE, this defendant, Washington-Oregon Corporation, prays that this court will grant such relief in the premises as may be just and equitable.

Dated this 1st day of April, 1915.

WASHINGTON–OREGON CORPORATION.

By CHAS. S. LYONS,

Solicitor for Defendant Washington-Oregon Corporation.

(Filed Apr. 2, 1915.) [21]

Order (Permitting Crane Co. to File its Intervening Petition Herein).

Now at this time came on regularly to be heard the motion of Crane Co., a corporation, to file its petition of intervention in the above-entitled suit, the said Crane Co., a corporation, appearing by its attorneys, Seitz & Clark of Portland, Oregon, and the Court being fully advised in the premises,

IT IS HEREBY ORDERED, That the said Crane Co., a corporation, be and it is hereby permitted and allowed to file its petition of intervention in the above-entitled suit and that the said Crane Co., a corporation, forthwith serve a copy of its said intervention upon the complainant in the above-entitled suit and that the rights of the said complainant to answer, move to dismiss or further plead with respect to said petition be and they hereby are reserved.

Dated at Tacoma, Washington, this 14th day of September, 1914.

EDWARD E. CUSHMAN,

Judge.

(Filed Sept. 14, 1914.) [22]

Order (Permitting Crane Co. to File Its Amended Petition of Intervention Herein).

This cause coming on this day to be heard on motion of Crane Co., intervenor herein, for leave to file its amended petition; and it appearing to the Court that the parties hereto have stipulated and agreed that said Crane Co. may file its said amended petition,

NOW THEREFORE IT IS ORDERED That the said Crane Co. be and it is hereby given leave to file its amended petition herein.

Dated this 1st day of March, A. D., 1915.

EDWARD E. CUSHMAN,
Judge.

(Filed Mar. 1, 1915.) **[23]**

Amended Intervening Petition of Crane Co.

Comes now Crane Co. by leave of court first had and obtained and files its amended intervening petition herein and respectfully represents unto the court as follows:

I.

That it is a corporation organized and existing under and by virtue of the laws of the State of Illinois, with its principal office and place of business in the city of Chicago, Illinois, and that it is and was during all the time herein stated duly registered and authorized to do business in the States of Washington and Oregon, and that it was and is among other things engaged in the manufacture and sale of the

merchandise hereinafter mentioned.

II.

That the defendant Washington-Oregon Corporation is a corporation organized and existing under and by virtue of the laws of the State of Washington, and is engaged in the business occupations and pursuits hereinafter stated.

III.

That the Fidelity Trust Company, the plaintiff, is a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania.

IV.

That at all of the times herein stated the said Washington-Oregon Corporation was and is authorized to acquire, lease, construct, own, hold, maintain, use and operate in the public streets and ways and elsewhere within the States of Washington and Oregon, electric railways and railroads and to generally engage in the business of a common carrier of both [24] freight and passengers within said States; that said corporation was and is further authorized to own, hold, maintain, use, and operate power plants for the manufacture, generation, production and sale of electricity and electrical energy for commercial and other purposes and to transmit the same through, upon, along and *other* public highways, private ways and private lands throughout said States, and to supply cities, towns and municipal corporations in the States of Washington and Oregon with water power water, electric lights, power and energy, and to own and hold the necessary

equipment, lines, tracts and stations to conduct and operate said businesses, and to acquire, secure, own, and hold franchises and other public rights from various towns, cities, and municipal corporations throughout said States; that the said Washington-Oregon Corporation was during all of the time and times herein stated and now is engaged in the businesses, occupations and pursuits hereinbefore stated, owning, holding and operating under franchises from cities and towns throughout said States of Washington and Oregon.

V.

That on or about the 20th day of May, 1911, the said Washington-Oregon Corporation made and executed a mortgage to the said Fidelity & Trust Company; that said mortgage was executed to the said Fidelity & Trust Company, as trustee, to secure a bond issue of the said Washington-Oregon Corporation, a corporation, to the amount of Five Million ($5,000,000) Dollars; that said bonds issued and to be issued were to bear and bore interest at the rate of six per cent (6%) per annum, payable semi-annually, on the 1st day of April and the 1st day of November of each year; that said mortgage covered and constituted a lien to the amount of any and all bonds issued and [25] outstanding, on all of the visible and tangible rights, franchises and property then owned by the said Washington-Oregon Corporation, a corporation, as hereinbefore described, and that thereafter might be required by it; that said mortgage was duly filed and recorded in the various counties of the States of Oregon and Wash-

ington where the said Washington-Oregon Corporation, a corporation, holds or owns property or franchises.

VI.

That on the 31st day of July, 1914, the said Fidelity & Trust Company, acting in its capacity as Trustee under said mortgage, and on behalf of the holders of said bonds filed its complaint in this court in the usual form setting out the execution and recording of said mortgage and the properties covered thereby, and alleging a default of said mortgage among other things in the payment of interest accrued thereon, and praying that said mortgage be decreed a first and valid lien on all of said rights and properties of the said Washington-Oregon Corporation, a corporation, and that the same be foreclosed and said rights and properties sold under a decree of said court to satisfy claims of said bond holders; that reference is hereby made to the original complaint on file herein for the specific allegations thereof describing said property and setting out the default of the said Washington-Oregon Corporation, a corporation therein, which said allegations of said complaint are hereby made a part of this petition; that pending said foreclosure proceedings or a satisfactory adjustment thereof and disposition of said properties that a receiver be appointed to take charge of said properties of the said Washington-Oregon Corporation, a corporation, and to operate the same under the instructions and orders of said Court. [26]

VII.

That in accordance with the prayer of said complaint on the 31st day of July, 1914, one Elmer M. Hayden, of Tacoma, Washington, was appointed by said Court receiver of said properties of the said Washington-Oregon Corporation, a corporation, with the usual powers of a receiver in such cases to operate and conduct the business of said corporation under the orders and instuctions of said Court; that said receiver is now and has since his appointment been, in charge of the operation and management of said property and has operated and is now operating and conducting the same.

VIII.

That your petitioner Crane Co. at divers times between the 1st day of January, 1911, and the 31st day of May, 1914, both inclusive, sold and delivered to the said Washington-Oregon Corporation a corporation, at its special instance and request, goods, wares and merchandise; that said goods, wares and merchandise were sold upon orders or requisitions issued by the said Washington-Oregon Corporation, a corporation; that the dates upon which said goods, wares and merchandise were furnished and the agreed and reasonable amount thereof is in accordance with the exhibit hereto attached, marked exhibit "A" and by reference made a part hereof; that thereafter beginning with the 5th day of April, 1911, and ending with the 31st day of May, 1914, the said Washington-Oregon Corporation made certain payments and were given certain credits to apply on

said account, said payments and credits being in accordance with exhibit "B" hereto attached and by reference made a part of this petition; that on June 1, 1914, a balance was struck between your petitioner and the Washington-Oregon Corporation, and on [27] said date there was found to be due from the said Washington-Oregon Corporation to your petitioner the sum of Thirteen Thousand Two Hundred Twenty-three and 25/100 ($13,223.25) Dollars, and that to evidence said indebtedness on said date the said Washington-Oregon Corporation executed its promissory notes six (6) in number, payable to the order of your petitioner at future dates, aggregating said amount, one of which said notes was thereafter, to wit, on July 7, 1914, paid; that the unpaid notes issued by the said Washington-Oregon Corporation, as aforesaid, are in accordance with the exhibits hereto attached, marked exhibit 1 to 5 inclusive and by reference made a part of this petition; that thereafter and between the 1st day of June, 1914, and the 15th day of July, 1914, inclusive, additional goods, wares and merchandise were sold and delivered by your petitioner to the Washington-Oregon Corporation, of the agreed and reasonable value of Fifty-eight and 68/100 ($58.68) Dollars upon which the sum of Two and 65/100 ($2.65) Dollars was paid on June 1, 1914, leaving a balance due and unpaid of Fifty-six and 03/100 ($56.03) Dollars; that said goods, wares and merchandise were furnished at the time and in the amounts as set forth in exhibit "C" hereto attached and by reference made a part hereof.

IX.

That said goods, wares, and merchandise furnished by your petitioner to the said Washington-Oregon Corporation, a corporation, as aforesaid, consisted of repairs, equipment and materials necessary to be used, and which were accepted and used by the said Washington-Oregon Corporation, a corporation, in the repair and maintenance and conduct of its power, gas and electric plants, railroads, and railways and waterworks throughout said States of Washington and Oregon, and in making [28] necessary improvements and additions thereon and thereto, and were necessary to the business of said corporation, and the preservation of its property and to maintain and continue it as a going concern; that without the use of said goods, wares and merchandise furnished by your petitioner as aforesaid, it would have been impossible and impracticable for the said Washington-Oregon Corporation, a corporation, to have conducted or operated its said business.

X.

That the repairs, equipment and materials furnished by your petitioner as aforesaid have greatly and permanently enhanced and increased the value of the properties and assets of the said Washington-Oregon Corporation, and which are included in said mortgage, and were as hereinbefore stated, necessary to continue said corporation as a going concern, and thus conserve and protect the property, franchises and assets of said corporation, which otherwise would have become wasted and forfeited.

XI.

That the said Washington-Oregon Corporation, a corporation, is and was a public service corporation, and the convenience, interest and welfare of the public demanded, and the said Fidelity Trust Company, and the holders of said bonds and other parties interested therein, contemplated that the business of said corporation be continued and that it be maintained as a going concern, and that in the maintenance of said corporation as such going concern, it was imperative and necessary that repairs, equipment and materials be furnished to said corporation from time to time as its business and necessities demanded. [29]

XII.

That said goods, wares and merchandise, appliances and repairs furnished by your petitioner as aforesaid were furnished to the said Washington-Oregon Corporation, a corporation, upon the understanding that the same would be paid out of the current income of said corporation and to that end your petitioner permitted said account to continue as a running account, and to accept thereon such payments as the Washington-Oregon Corporation declared its ability to make, and that your petitioner relied upon a continuance of the business of the said Washington-Oregon Corporation, and that said current income would be applied toward the payments of the amounts due your petitioner as aforesaid.

XIII.

That your petitioner is informed and believes, and therefore states the facts to be that the current in-

come of the said Washington-Oregon Corporation, a corporation, has not been used in the payment of current expenses, including your petitioner's claim, but on the contrary the same has been wrongfully and improperly diverted for the payment of interest on said bonded indebtedness and for permanent extensions and improvements on said property, which have largely and greatly increased the assets of the said Washington-Oregon Corporation, and likewise the security under said mortgage.

XIV.

That the said Washington-Oregon Corporation at and during all of the times herein stated was operating and conducting its said electric light *platns,* power plants, water works, gas plants and electric railroads and railways [30] throughout said States of Washington and Oregon as a single unit, and all of the funds derived from the operation of its several and respective properties were mixed and mingled as a common fund, out of which it was agreed and understood that the claim of your petitioner should and would be paid; that said fund diverted as hereinbefore stated has been more than sufficient to pay your petitioner's claim.

XV.

That by reason of the fact that said goods, wages and merchandise were furnished by your petitioner for the purpose aforesaid, and because of the fact that the furnishing of said merchandise enabled the said Washington-Oregon Corporation to continue as a going concern, and thus enable it to perform its obligations to the public as a public service corpora-

tion and preserve its assets and franchises, and because of the fact that the said goods, wares and merchandise have greatly increased the value of said properties, your petitioner has, and in equity and good conscience should have, a first and prior lien to said mortgage on the said property of the said Washington-Oregon Corporation, and on the income of said receivership, and upon the moneys received by said Washington-Oregon Corporation, and improperly diverted as aforesaid to the amount of your petitioner's claim as hereinbefore stated.

XVI.

That the said Washington-Oregon Corporation, a corporation, is insolvent; that the only property and assets out of which or upon which your petitioner could satisfy its claim are included in said mortgage, and unless your petitioner may be decreed to have a first and prior lien upon said [31] income and property as hereinbefore stated, your petitioner will lose the amount of its said claim; that because thereof your petitioner has no adequate or speedy remedy a law.

WHEREFORE, your petitioner prays that it be allowed to file this its intervening petition in this cause and that its claim in the amount of Eleven Thousand Two Hundred and Two and 70/100 ($11,202.70) Dollars be decreed to be superior and prior lien to said mortgage, and the claim of complainant to this suit; that the said complainant and said receiver be compelled to pay out of the earnings of receivership or out of money in their hands or

from the moneys wrongfully diverted as hereinbefore stated the amount of your petitioner's claim, and that in the event the same is insufficient to pay your petitioner's claim and in the event of a sale of the property under a decree in this suit that the proceeds of any such sale or sales shall be applied first to the payment of the claim of your petitioner; and that your petitioner may have such other and further relief as may be agreeable in equity and as to the Court may seem meet, including the costs and disbursements incurred by your petitioner herein.

SEITZ & CLARK,

Attorneys for Crane Co., Petitioner.

(Verified.) **[32]**

Exhibit "A" [to Amended Intervening Petition of Crane Co.].

1911		1911 (Cont.)	
Jan. 20	$1,029.25	May 1	$247.04
" 25	18.90	" 1	6,246.52
Feb. 1	6.39	" 4	7.75
" 6	96.26	" 4	399.60
" 16	33.59	" 6	54.22
" 21	.45	" 9	132.15
" 25	211.16	" 10	9.45
Mar. 1	16.11	" 10	9.45
" 1	108.34	" 10	195.89
" 4	22.75	" 10	5.70
" 7	3.74	" 12	90.70
" 8	1,663.43	" 12	10.58
" 11	101.02	" 13	379.32
" 9	126.06	May 12	116.18
" 20	23.93	" 18	1,231.90
" 22	212.21	" 20	108.23
" 22	29.18	" 15	12.12
" 23	22.20	" 20	216.83
" 28	6.93	" 17	2,108.78
" 25	1.44	" 22	8.53
" 29	124.27	" 22	203.23
" 30	1,482.06	" 23	1.38
Apr. 1	3.37	" 23	6.59
" 1	224.45	" 18	3,770.03
" 4	31.10	" 24	182.66
" 5	113.83	" 23	550.95
" 6	136.56	" 24	36.45
" 8	18.90	" 24	25.01
" 8	397.93	" 25	165.33
" 10	.60	" 25	6.60
" 12	146.39	" 26	48.20
" 13	3.68	" 27	100.66
" 15	2.31	" 27	122.40
" 10	100.12	" 27	198.66
" 19	10.80	June 1	101.82
" 20	265.76	May 31	38.88
" 21	398.83	June 2	146.70
" 21	29.14	" 2	1.30
" 15	3,711.00	" 1	86.40
" 14	.68	" 3	31.96
" 21	2,644.05	May 25	32.08
" 25	50.98	June 1	3.00
" 27	223.20	" 2	209.37
" 27	175.89	" 3	3.15

1911 (Cont.)		1911 (Cont.)	
June 1	$20.57	June 14	$12.70
" 1	67.10	" 14	113.14
June 1	1,866.23	" 14	107.60
" 1	106.36	" 8	24.30
" 1	61.88	" 14	14.21
" 1	9.93	" 15	612.43
May 30	73.80	" 17	1.65
June 1	2,460.00	" 17	6.48
" 6	58.80	" 19	7.80
" 6	5.04	" 14	4.97
" 6	37.62	" 14	3,726.97
" 6	68.15	" 19	17.60
" 6	16.50	" 20	327.60
" 6	9.79	" 20	11.88
" 6	7.20	" 20	91.34
" 2	2.25	" 20	9.76
" 7	6.47	" 21	.50
" 7	11.10	" 22	12.72
" 7	3.50	" 22	258.97
" 7	544.96	" 22	118.11
" 7	21.45	" 22	715.64
" 7	10.18	" 23	78.03
" 7	55.33	" 24	26.17
" 7	43.73	" 23	44.08
May 18	10.80	" 23	206.04
June 8	120.03	" 24	45.78
[33]			
June 8	69.26	" 26	12.43
" 8	88.50	" 26	65.54
" 8	8.06	" 26	41.04
" 9	1.53	" 27	207.44
" 10	22.43	" 28	28.73
" 10	17.06	" 28	12.38
" 10	746.84	" 15	30.31
" 10	10.34	" 28	68.29
" 10	34.65	June 30	51.75
" 10	11.00	July 1	18.24
" 10	22.00	" 1	163.22
" 13	13.50	" 1	45.00
" 13	55.60	" 27	99.72
" 13	9.35	July 1	80.64
" 12	191.63	" 1	210.75
" 5	6,245.10	" 5	174.46
" 13	6.60	" 6	63.34
" 13	3.96	" 6	110.73
" 13	23.65	" 7	214.00
" 9	2,048.43	" 7	234.00
" 14	67.37	" 8	43.43
" 14	153.73	" 7	290.03
" 14	2.00	" 8	18.14

1911 (Cont.)

July	10	$155.96
"	11	11.76
"	12	112.22
"	13	17.25
"	13	4.68
"	13	50.40
"	14	17.20
"	11	45.24
"	14	95.00
"	14	226.41
"	15	47.57
"	15	4.86
"	17	12.49
"	17	65.04
"	17	29.91
"	17	772.83
"	17	55.43
"	18	40.32
"	18	304.52
"	19	69.81
"	20	247.56
"	20	45.91
"	20	9.16
"	20	52.92
"	22	8.48
"	22	489.96
"	22	980.17
"	22	6.32
"	21	43.20
"	21	9.36
"	21	145.79
"	24	4.79
"	24	3.50
"	24	47.60
"	24	16.22
"	25	164.29
"	20	2.02
"	26	1.80
"	26	151.24
"	24	12.87
"	27	17.99

[34]

July	27	1,117.79
"	27	19.65
"	27	32.40
"	27	22.20
"	27	11.40
"	27	4.56
"	29	10.06
"	29	15.75

1911 (Cont.)

July	31	$123.00
"	31	63.21
Aug.	1	24.00
"	1	47.14
"	1	13.68
"	1	72.96
"	1	1.22
"	1	38.80
"	1	31.27
"	3	44.83
"	1	15.10
"	3	15.15
"	3	33.66
"	3	13.33
"	4	261.58
"	8	38.45
"	8	102.92
"	8	800.88
"	9	126.00
"	9	99.00
"	9	29.19
"	10	216.51
"	10	48.43
"	10	239.62
"	11	46.04
"	12	303.87
"	14	6.32
"	14	58.23
"	16	32.06
"	16	48.82
"	17	.35
"	19	14.23
"	13	65.75
"	21	7.95
"	22	93.75
"	23	3.48
"	24	31.50
	24	2,171.46
"	24	44.61
"	24	8.10
"	25	168.04
"	26	25.68
"	29	10.50
"	29	3.16
"	29	48.02
"	30	15.30
"	30	4.88
"	30	7.63
"	31	184.00

	1911 (Cont.)			1911 (Cont.)	
Sept.	1	$34.63	Oct	31	$228.90
"	1	26.87	Nov.	1	26.55
"	1	143.55	"	1	9.24
"	5	514.14	"	1	17.26
Aug.	31	13.23	"	11	2.29
Sept.	7	13.68	"	21	1.88
"	7	93.43	"	22	.65
"	7	90.00	"	24	30.58
"	7	157.50	"	30	234.65
			[35]		
"	7	26.60	Dec.	1	92.64
"	7	57.57	"	2	328.59
"	7	2.91	"	5	514.55
"	11	9.02	"	6	575.54
"	12	57.20	"	9	34.16
"	12	18.13	"	12	41.08
"	13	45.43	"	16	71.98
"	14	138.59	"	18	93.51
"	14	22.63	"	27	128.22
"	14	44.54	"	31	228.64
"	19	2.01		1912.	
"	20	4.05	Jan.	3	57.30
"	20	138.52	"	3	396.05
"	20	111.51	"	9	3.34
"	26	45.22	"	13	24.29
"	30	198.80	"	15	3.77
Oct.	2	.75	"	16	2.16
"	2	15.95	"	18	.64
"	3	75.14	"	18	34.68
"	3	8.40	"	19	9.54
"	4	42.83	"	22.	46.48
"	13	3.32	"	22	41.31
"	14	280.12	"	24	90.50
"	14	157.50	"	27	27.36
"	14	107.10	"	31	185.90
"	17	155.85	"	31	115.64
"	17	12.76	"	31	208.82
"	17	24.50	Feb.	1	103.91
"	18	71.55	"	1	22.57
"	18	12.22	"	1	8.95
"	18	551.02	"	3	152.30
"	19	14.00	"	5	76.75
"	19	45.50	"	7	130.72
"	20	25.17	"	6	27.84
"	18	30.78	"	8	47.37
"	18	18.77	"	14	3.00
"	26	13.50	"	23	18.72
"	27	1.65	"	24	528.00
"	28	33.75	"	27	10.90
"	28	4.48	"	29	174.65

1912 (Cont.)	
Feb. 29	$11.91
Mar. 9	317.07
" 12	189.63
" 13	3.60
" 15	58.80
" 16	109.25
" 20	.55
" 21	75.58
" 21	.50
" 23	2.55
" 25	4.68
" 29	56.67
" 31	148.05
Apr. 3	148.27
" 4	222.88
" 5	3.94
" 2	1.05
" 8	4.25
" 16	1,433.50
" 22	100.45
" 24	53.00
" 24	64.93
" 30	140.75
May 1	32.48
" 4	380.63
" 6	231.20
" 8	4.73
" 8	11.82
" 11	95.72
" 14	43.44
" 17	356.70
" 17	41.72
" 20	130.41
" 20	260.30
" 20	171.38
" 9	49.00
" 16	9.00
" 23	7.90
" 23	9.46
" 24	63.82
" 29	20.45
" 31	133.00
June 4	38.29
" 6	9.41
" 8	6.08
" 8	1.46
" 10	13.65
" 10	266.00
" 12	39.00
" 12	2.88

1912 (Cont.)	
June 15	$222.18
" 1	1.50
" 18	1,202.48
" 19	176.80
" 22	17.89
" 22	887.16
" 20	2.80
" 19	535.28
" 19	1,868.70
" 25	110.87
" 26	1,680.04
" 26	168.55
" 30	137.75
" 30	123.69
July 1	28.50
" 1	28.50
" 1	33.95
" 1	18.30
" 1	9.10
" 10	45.00
" 12	79.58
" 15	485.30
" 16	561.91
" 16	186.36
" 16	110.14
[36]	
July 17	13.16
" 20	66.78
" 23	392.40
" 23	85.50
" 25	75.54
" 25	5.60
" 29	42.75
" 29	116.41
" 30	41.76
" 30	15.39
" 31	151.54
Aug. 1	28.55
" 5	17.10
" 12	16.51
" 31	166.60
Sept. 30	193.34
Oct. 8	117.04
" 8	88.48
" 9	130.39
" 9	7.37
" 10	45.00
" 11	5.40
" 17	441.70
" 12	298.11
" 31	165.73

1912 (Cont.)

Nov.	1	$68.48
"	1	62.69
"	1	4.23
"	2	126.71
"	2	33.12
"	9	2.82
"	6	9.19
"	12	47.50
"	12	25.55
"	19	10.94
"	19	39.67
"	18	4.50
"	21	79.80
"	30	158.37
Dec.	9	92.26
"	10	38.80
"	28	216.41
"	28	62.06
"	31	150.95

1913.

Jan.	21	15.00
"	23	14.86
"	31	151.98
Feb.	3	4.35
"	10	.43
"	28	128.00
Mar.	3	15.69
"	4	112.73
"	5	15.96
"	11	6.27
Mr.	19	19.88
"	12	45.00
"	20	21.08
"	27	214.62
"	31	83.60
Apr.	22	127.93
"	18	149.66
"	30	71.65
"	25	176.84
May	1	53.44
"	1	42.84
"	1	173.89
"	1	111.24
"	3	302.25

1913 (Cont.)

May	6	$1.88
"	9	45.90
"	10	300.08
"	12	57.85
"	20	805.26
"	22	16.95
"	22	551.11
"	31	75.15
June	2	1.07
"	12	25.20
"	25	18.00
"	27	78.59
"	30	92.05
July	19	49.35
"	22	6.84
"	21	117.75
"	24	15.46
"	31	93.50
Aug.	1	125.75
"	5	3.74
"	31	94.21
Sept.	30	91.90
Oct.	31	88.50
Nov.	5	.49
"	8	62.12
"	8	64.09
"	11	163.87
"	30	87.20
Dec.	1	1.18
"	31	86.06

1914.

Jan.	31	86.65
Feb.	2	38.38
"	28	87.22
Mar.	6	21.28
"	9	71.16
"	31	88.05
Apr.	1	27.34
"	1	39.07
"	21	55.20
"	30	88.66
May	20	18.58
"	31	89.25

Exhibit "B" [to Amended Intervening Petition of Crane Co.].

1911.		1912 (Cont.)	
Apr. 5	$8.36	Aug. 31	$44.43
" 20	22.20	Oct. 3	5,009.16
May 1	1,396.00	" 8	391.12
June 3	23.93	" 17	739.94
" 19	7,718.17	Nov. 1	386.59
July 21	110.92	" 12	78.65
" 21	6,526.69	" 16	2,539.47
" 21	40.93	" 19	50.61
Aug. 3	.38	" 20	2.43
" 4	2.27	Dec. 9	38.80
" 21	3,142.39	" 9	90.83
" 29	5,130.42	" 10	.45
" 21	42.68	" 28	277.80
" 30	314.10	1913.	
Sept. 12	5,239.95	Jan. 10	1.00
Oct. 13	2,644.05	" 23	29.86
" 5	29.50	Feb. 15	7,193.37
Nov. 2	390.09	" 3	4.35
" 18	5,000.00	" 6	112.40
Dec. 29	4,983.51	" 19	297.07
Nov. 15	12.22	Mar. 3	189.81
1912.		" 6	.43
Jan. 20	5,131.02	" 12	5,068.57
Feb. 6	23.31	July 19	49.35
" 29	4,985.92	" 22	6.84
Mar. 14	9.06	" 25	117.75
" 22	9.50	" 30	125.75
" 26	58.95	Aug. 5	49.35
" 28	2,500.00	Sept. 18	1,000.00
Apr. 24	2,000.00	Nov. 7	284.55
May 23	1,117.79	" 8	163.05
" 23	123.40	" 8	379.40
July 10	97.80	Dec. 13	5.53
" 10	4.38	1914.	
" 10	47.37	Mar. 6	92.74
" 23	1.46	" 21	27.34
Aug. 24	1,300.00	" 30	95.31
" 31	600.59	May 20	18.58
" 31	1,869.26	" 26	250.00

[38]

Exhibit "C" [to Amended Intervening Petition of Crane Co.].

1914.	
June 1	2.65
" 24	26.80
July 15	29.23

[39]

$2,500.00 June 1, 1914.

August 1, 1914. After date, without grace, we promise to pay to the order of Crane Co. at Portland, Oregon, TWENTY-FIVE HUNDRED and no/100 ——— Dollars in Gold Coin of the United States of America, with interest, thereon in like Gold Coin at the rate of 8 per cent per annum from date until paid for value received. Interest payable at maturity and in case suit or action is instituted to collect this Note, or any portion thereof, we promise to pay such additional sum as the Court may adjudge reasonable as Attorney's fees in said suit or action.

———Due———

WASHINGTON-OREGON CORPORATION. [40]

$2,500.00 June 1, 1914.

September 1, 1914, after date, without grace, we promise to pay to the order of Crane Co. at Portland, Oregon, Twenty-five Hundred and no/100 Dollars in Gold Coin of the United States of America, with interest, thereon in like Gold Coin at the rate of 8 per cent per annum from date until paid for value received. Interest payable at maturity and in case suit or action is instituted to collect this Note, or any portion thereof, we promise to pay such additional sum as the Court may adjudge reasonable as Attorney's fees in said suit or action.

———Due———

WASHINGTON-OREGON CORPORATION. [41]

$2,000.00 June 1, 1914.

October 1, 1914, after date, without grace, we promise to pay to the order of Crane Co. at Portland, Oregon, Two Thousand and no/100———Dollars in Gold Coin of the United States of America, with interest, thereon in like Gold Coin at the rate 8 per cent per annum from date until paid for value received. Interest payable at maturity and in case suit or action is instituted to collect this Note, or any portion thereof, we promise to pay such additional sum as the Court may adjudge reasonable as Attorney's fees in said suit or action.

———Due———

WASHINGTON-OREGON CORPORATION. [42]

$2,000.00 June 1, 1914.

November 1, 1914, after date, without grace, we promise to pay to the order of Crane Co. at Portland, Oregon, Two Thousand and no/100———Dollars in Gold Coin of the United States of America, with interest thereon in like Gold Coin at the rate of 8 per cent per annum from date until paid for value received. Interest payable at maturity and in case suit or action is instituted to collect this Note, or any portion thereof, we promise to pay such additional sum as the Court may adjudge reasonable as Attorney's fees in said suit or action.

———Due———

WASHINGTON-OREGON CORPORATION. [43]

$2,000.00 June 1, 1914.

December 1, 1914, after date, without grace, we promise to pay to the order of Crane Co. at Portland, Oregon, Two Thousand and no/100———Dollars in Gold Coin of the United States of America, with interest thereon in like Gold Coin at the rate of 8 per cent per annum from date until paid for value received. Interest payable at maturity and in case suit or action is instituted to collect this Note, or any portion thereof, we promise to pay such additional sum as the Court may adjudge reasonable as Attorney's fees in said suit or action.

———Due———

WASHINGTON-OREGON CORPORATION.

(Filed March 1, 1915.) [44]

Answer.

Comes now the Fidelity Trust Company, a corporation, by its solicitors, Randolph W. Childs, Maurice A. Langhorne and F. D. Metzger, and for answer to the complaint in intervention filed herein says:

I.

The complainant, Fidelity Trust Company, avers and alleges that the facts stated in said bill of intervention are insufficient in law or equity to entitle the intervenor to the relief prayed for in said bill of intervention, and complainant moves the Court to dismiss said bill for want of equity therein.

II.

Further answering said bill of intervention, this complainant specifically admits the allegations set forth in the paragraphs of said bill of intervention numbered I, II, III, IV, V, VI, and VII.

III.

For answer to the allegations set forth in the paragraph of said bill of intervention numbered VIII complainant denies that it has any knowledge or information of any of the allegations of said paragraph sufficient to form a belief thereof, and therefor denies the same.

IV.

For answer to the allegations set forth in the paragraph of said bill of intervention numbered IX complainant denies that it has any knowledge or information of any of the allegations of said paragraph sufficient to form a belief thereof, and therefore denies the same.

V.

For answer to the allegations set forth in the paragraph [45] of said bill of intervention numbered X complainant denies that it has any knowledge or information of any of the allegations of said paragraph sufficient to form a belief thereof, and therefore denies the same.

VI.

For answer to the allegations set forth in the paragraph of said bill of intervention numbered XI complainant denies that it has any knowledge or information of any of the allegations of said paragraph sufficient to form a belief thereof, and therefore

denies the same, except that it admits that a part of the business of said Washington-Oregon Corporation was that of a public service corporation and that the convenience, interest and welfare of the public would be furthered if the business of said corporation were continued and if the said corporation were maintained as a going concern and that if it continued its business it was necessary that repairs, equipment and materials should be furnished to said corporation from time to time as its business and necessities demanded.

VII.

For answer to the allegations set forth in the paragraph of said bill of intervention numbered XII complainant denies that it has any knowledge or information of any of the allegations of said paragraph sufficient to form a belief thereof, and therefore denies the same.

VIII.

For answer to the allegations set forth in the paragraph of said bill of intervention numbered XIII complainant denies that it has any knowledge or information of any of the allegations of said paragraph sufficient to form a belief thereof, and therefore denies the same, except that it denies that current income of said Washington-Oregon Corporation has [46] been wrongfully or improperly diverted for the payment of interest on said bonded indebtedness or for permanent extensions and improvements on said property.

IX

For answer to the allegations set forth in the

paragraph of said bill of intervention numbered XIV complainant denies that it has any knowledge or information of any of the allegations of said paragraph sufficient to form a belief thereof, and therefore denies the same, except that it admits that said Washington-Oregon Corporation at and during all of the times herein stated was operating and conducting such of its said electric light plants, power plants, water works, gas plants and electric railroads and railways as it owned at any of said times throughout said States of Washington and Oregon as a single unit and that all of the funds derived from the operation of its several and respective properties were mixed and mingled as a common fund.

X.

For answer to the allegations set forth in the paragraph of said bill of intervention numbered XV complainant denies that it has any knowledge or information of any of the allegations of said paragraph spfficient to form a belief thereof, and therefore denies the same.

XI.

For answer to the allegations set forth in the paragraph of said bill of intervention numbered XVI complainant denies that it has any knowledge or information of any of the allegations of said paragraph sufficient to form a belief thereof, and therefore denies the same, except that it admits that the said Washington-Oregon Corporation is insolvent.

[47]

XII.

This complainant denies that said intervenor is entitled to any relief whatsoever or any part of the relief in said complaint in intervention demanded and alleges that said intervenor has no standing in this court nor any court of equity.

XIII.

And this complainant prays in all things the same benefit and advantages of this answer as if it had moved to dismiss the said bill of intervention and every part thereof.

FIDELITY TRUST COMPANY.
RANDOLPH W. CHILDS.
By MAURICE A. LANGHORNE,
F. D. METZGER,
Its Solicitors.

(Verification.)
(Filed Oct. 3, 1914.) [48]

Stipulation (Re Answer).

IT IS HEREBY STIPULATED by and between the parties by their respective attorneys that the answer filed to the original bill of intervention by Crane Co. filed herein, may stand as the answer to the amended Bill of Intervention filed by Crane Co.

It is further stipulated that any and all affirmative matter set up in said answer is to be deemed denied by the intervenor, Crane Co.

Dated this —— day of November, 1915.

RANDOLPH W. CHILDS,
Solicitor for Receiver and Fidelity Trust Co.

MAURICE W. SEITZ,
Solicitor for Crane Co.

(Filed Nov. 8, 1915.) [49]

Stipulation (of Facts).

The plaintiff, Fidelity Trust Company, Elmer M. Hayden, as temporary receiver in this suit, and the intervenor, Crane Co., for the purpose of this suit, hereby waive the right to prove any facts other than the following stipulated facts relative to the claim of Crane Co.:

I.

So many of the facts set forth in the amended petition of Crane Co. herein as are admitted in the answer of the Fidelity Trust Company or Elmer M. Hayden, receiver thereto, are hereby incorporated in this stipulation and made a part hereof.

II.

That Crane Co. at divers times between the 1st day of January, 1911, and the 31st day of May, 1913, inclusive, sold and delivered to the Washington-Oregon Corporation, a corporation, at its special instance and request, goods, wares, and merchandise; that said goods, wares and merchandise were sold upon orders or requisitions issued by said Washington-Oregon Corporation, and that the date upon which said goods, wares and merchandise were furnished and the reasonable value thereof is in accord-

ance with exhibit "A" annexed to the amended bill of intervention; that thereafter beginning with the 5th day of April, 1911, and ending with the 31st day of May, 1914, the said Washington-Oregon Corporation made certain payments and was given certain credits to apply on said account; said payments having been made on the dates and in the amounts as evidenced by exhibit "B" annexed to the amended bill of intervention; that on June 1st, 1914, a balance was struck **[50]** between Crane Co. and Washington-Oregon Corporation, and on said date there was found to be due from the said Washington-Oregon Corporation to Crane Co. the sum of $13,225.25, and that to evidence said indebtedness, on said date the Washington-Oregon Corporation executed its promissory notes, six in number, payable to the order of Crane Co. at future dates, aggregating said amount; that one of said notes was thereafter on June 7th, 1914, paid; that the unpaid notes issued by the said Washington-Oregon Corporation as aforesaid, are in accordance with the copies hereto attached, marked exhibit "1" to "5," inclusive, and made a part hereof; that on June 24th, 1914, goods, wares and merchandise were sold to the Washington-Oregon Corporation amounting to the sum of $26.80; that on July 15th, 1914, goods, wares and merchandise were sold to the Washington-Oregon Corporation in the amount of $29.23, which said goods, wares and merchandise were used for the purposes indicated by exhibits "6" and "7" hereto attached.

III.

That a portion of the goods, wares and merchandise furnished by the Crane Co. as aforesaid, represented by the unpaid notes as aforesaid, consisted of materials which were furnished at Vancouver, Washington, on the dates indicated by the invoices hereto attached, marked exhibits "A–1" to "A–22," inclusive; and were used for the purposes as explained and indicated by exhibit "A."

IV.

That a portion of the materials furnished by Crane Co. as aforesaid, represented by the unpaid notes as aforesaid, were furnished to the Washington-Oregon Corporation at Hillsboro, Oregon, and consisted of the materials as represented and [51] indicated by the exhibits hereto attached, marked exhibits "B–1" to "B–18," inclusive, and were used for the purposes explained and indicated in exhibit "B" hereto attached.

V.

That a portion of the materials furnished by Crane Co. as aforesaid, represented by the unpaid notes as aforesaid, were furnished to the Washington-Oregon Corporation at Chehalis, Washington, and consisted of the materials as represented and indicated by the exhibits hereto annexed, marked exhibits "C–1" to "C–8," inclusive, and were used for the purposes explained and indicated in exhibit "C" hereto annexed.

VI.

That a portion of the merchandise furnished by Crane Co. as aforesaid, and represented by said un-

paid notes, were furnished to the Washington-Oregon Corporation at Centralia, Washington, and consisted of the materials as represented and indicated by the exhibits hereto annexed, marked exhibits "D–1" to "D–5," and were used for the purposes explained and indicated in exhibit "D" hereto annexed.

VII.

That a portion of the merchandise furnished by Crane Co. as aforesaid, and represented by said unpaid notes, were furnished to the Washington-Oregon Corporation at Kelso, Washington, and consisted of the materials as represented and indicated by the exhibits hereto annexed, marked exhibits "E–1" to "E–3," and were used for the purposes explained and indicated in exhibit "E" hereto annexed.

VIII.

That the reports of the temporary receiver herein, with the exhibits thereto attached, are to be deemed as in evidence [52] to the extent that such reports or exhibits purport to state the earnings of said receiver, from the date of the appointment of said receiver, and the expenditures and nature thereof, and the balance of cash on hand at the time of the filing of said reports; and that testimony may be introduced by Crane Co. as to facts in those regards occurring subsequent to the filing of said last report, also any party hereto may introduce evidence in explanation of said reports.

IX

That Crane Co. is prepared to offer testimony to

the effect that the materials furnished by the intervenor herein were furnished and credits extended to the said Washington-Oregon Corporation in the reliance on the part of Crane Co. that the same would be paid out of the current earnings of said corporation, and that the current income would be applied toward the payment of said materials and that to that end Crane Co. permitted said account to continue as a running account and to accept payments thereon from time to time as the Washington-Oregon Corporation declared its ability to make such payments, and that Crane Co. relief upon a continuance of the business of the Washington-Oregon Corporation. For the purposes of this suit said testimony is to be deemed to have been introduced in evidence, subject to the objections of the temporary receiver and the complainant that the substance of such testimony is incompetent and irrelevant.

X.

That any party may introduce testimony showing the property acquired by said receiver since the date of said receivership, the money expended in acquiring said property, and the **[53]** source thereof, and the fair cash value of said property.

XI.

The interest was paid on outstanding bonds covered by the mortgage sought to be foreclosed herein, for the two years immediately prior to said receivership as shown in exhibit "Y" hereto annexed. Exhibit "Y" also shows the taxes paid, gross earnings, expenses and net earnings.

for the period indicated in said exhibit, and also shows how and for what purpose said earnings were disbursed, but any party may introduce testimony in explanation of said exhibit.

XII

That Crane Co. is prepared to offer testimony to the effect that the materials furnished by the intervenor herein were furnished to the said Washington-Oregon Corporation in the reliance on the part of Crane Co. that the same were to be paid out of the current earnings of said corporation, and that the said current income would be applied toward the payment of said materials, and that for the purposes of this suit such testimony is to be deemed to have been introduced in evidence subject to the objection of the temporary receiver and the complainant that such testimony is incompetent and irrelevant.

XIII.

That the materials furnished by Crane Co. were incorporated in and became a part of the property covered by the complainant's mortgage.

XIV.

Any party hereto may introduce testimony as to any sales, releases, or alienations in eminent domain proceedings effecting the property mortgages. [54]

XV.

None of the parties to this stipulation admit the relevancy of any of the facts hereto stipulated.

Dated at Tacoma, Washington, November 8, 1915.

MAURICE W. SEITZ,
Attorneys for Crane Co.

RANDOLPH W. CHILDS,
MAURICE A. LANGHORNE,
FREDERIC D. METZGER,
Attorneys for Temporary Receiver.

RANDOLPH W. CHILDS,
MAURICE A. LANGHORNE,
FREDERIC D. METZGER,
Attorneys for Complainant.

(Hereto are attached a number of exhibits.)
(Filed Nov. 8, 1915.) [55]

Stipulation [That Exhibit "Y" be Withdrawn from Stipulation Re Facts, etc.].

IT IS HEREBY STIPULATED, that exhibit "Y" be withdrawn from this stipulation as to the facts.

IT IS FURTHER STIPULATED that during the period within which Crane Company's claim accrued and thereafter, there were actual operating net earnings in excess of the interest of the Washington-Oregon Corporation due and paid by the Washington-Oregon Corporation during said period on the First and Consolidated Mortgage bonds covered by the present foreclosure suit and in excess of Crane Company's claim; and that if the intervenor Crane Company is held by the Court to be in the class of priority claimants and otherwise entitled to priority in enforcing its claim, the inter-

venor shall be decreed to be entitled to its claim.

November 8, 1915.

RANDOLPH W. CHILDS,
MAURICE A. LANGHORNE,
FREDERIC D. METZGER,
Attorneys for Complainant and Receiver.
MAURICE W. SEITZ,
Attorneys for Intervenor Crane Company.

(Filed Nov. 8, 1915.) **[56]**

Memorandum Decision, Filed December 4, 1915.

RANDOLPH W. CHILDS, for Complainant, and HAYDEN, LANGHORNE & METZGER, Temporary Receiver.

ROBERT B. WALKINSHAW.

M. W. SEITZ, for Intervenor.

CUSHMAN, District Judge.

Intervenor seeks a preference over the bonds secured by the mortgage foreclosed herein. The preference asserted is for $11,146.67 on account of merchandise furnished the mortgagor between May, 1911 and the appointment of the receiver herein July 31, 1914.

The mortgage foreclosed was given May 20, 1911, upon the property of the mortgagor, including its income. After default in one semi-annual payment of interest, foreclosure proceedings were begun July 31, 1914. The mortgagor operated certain water and gas plants and an electric railway in Washington and Oregon. The case has been sub-

mitted upon an agreed statement [57] of facts.

To entitle intervenor to the preference it prays, the material sold by it must have been sold upon the credit of the mortgagor's current income, and not upon its general credit. These materials must have been required for the ordinary repairs or operation of the mortgagor's plants, used in discharging its service to the public. There must have been either current income remaining in the hands of the receiver, or such income must be shown to have been diverted to the payment of interest due under the mortgage, or in the construction of extensions, or for some purpose to the advantage of the bondholders which would not be considered either repairs or expenses of operation. Further, the preference over the bondholders can only be allowed on account of materials so furnished within a reasonable time before the appoinment of a received. The burden is upon the intervenor to bring itself within these requirements and, if as concerning any one of these, it has not done so, it will not be necessary to determine whether it has so done as to the others. No citation of authority is needed to support the foregoing.

Before passing to the determination of this question, is it not out of place to observe that there has been no clear segregation showing what, if any, materials furnished were for use in connection with the mortgagor's electric railway line. It is not altogether clear that a preference will be given over the bonds secured by the mortgage upon the prop-

erty of all public service corporations. No decision by the Supreme Court has been called to my attention granting such a preference, except in cases of railroads.

While the terms of credit and convenience of the public is much the same and in many other respects the analogy between a railroad and other public service corporations is close, yet in one important particular there is a difference: The danger to the [58] traveling public upon a railroad which is suffered to remain out of repair is different in character and higher in degree than that incurred by those served by a run-down light, water or gas property and a different measure of care is required of the carrier.

34 CYC., 356 & 357, Note 82.

That the safety of the public is one of the reasons for the rule allowing a preference is not only shown in Fosdick v. Schall (99 U. S., 255), but by the following from Southern Railway v. Carnegie Steel Co. (176 U. S. 277):

> " * * * that, within this rule, a debt not contracted upon the personal credit of the company but to keep the railroad itself in condition to be used with reasonable safety for the transportation of persons and property, and with the expectation of the parties that it was to be met out of the current receipts of the company, may be treated as a current debt. * * *
>
> "But there is enough in the record to show that the rails purchased from the Carnegie

Company were needed in order that the roads in question might be kept by the railroad company in that condition of safety which its duty to the public and to the mortgage bondholders required. In August, 1892, *immediately after the receivers took possession of the railroads constituting the Danville system,* they reported to the court that the financial difficulties of the Danville Company during the previous two years had 'prevented the operating officers from being able to expend the proper amount *for new rails, and upon the roadbed and structures to keep the railroad in the condition in which it should be maintained,* * * * the foreclosure receivers represented to the court, by petition, that 'for the *proper* and *economical* operation of the lines of railroad of which they are receivers, and *for the safety of passengers and property transported over such roads,* as required by the order of this court appointing such receivers, two thousand tons of new steel rails are *an absolute necessity';* * * * Again * * * the court * * * made an order authorizing the receivers to purchase 2500 tons of new steel rails in order *'to properly operate the railroads'* in their charge, *'and for the safety of persons and property transported'* " (at pp. 285, 287 & 288.)

(The italics are those of the Supreme Court.)

"Suppose the court had directed the receivers in the Clyde suit, before turning over the property to the receivers in the foreclosure suit, to

> pay the claims of the Carnegie Company, is it possible that the mortgage creditors would have been heard to object to such an order? Certainly not, if it appeared, as it does satisfactorily appear in the present case, that the Carnegie debts were incurred in the ordinary course of business for the purpose of keeping the railroad in safe condition for use by the public." (at p. 291.) [59]

All but an insignificant part of the material furnished, for which a preference is asked, was furnished more than a year prior to the appointment of a receiver.

The business of the mortgagor is small in comparison with that of corporations operating railways in general. The mortgage trustee, promptly after default, brought suit to foreclose, asking the appointment of a receiver.

> "Why should a different rule be applied to the contracts made with the Carnegie Company *shortly before the appointments of receivers in the Clyde suit,* the original contract being for only 2500 tons, and the last one for 1656 tons?" (S. Ry. v. Carnegie Steel Co., 176 U. S., *supra,* at p. 289.)

This same expression is used a number of times throughout the decision, showing that it was not inadvertently done.

> "If the parties to the contract contemplated that the notes given for the rails should be paid for out of the current earnings of the railroad,

and if the Carnegie Company lost no equity merely by renewing the notes, it follows, under the settled doctrine of this court that the mortgagees could not have objected to the payment of the renewal notes out of any net earnings in in the hands of receivers, although the contract for rails was a few months back of the six months immediately preceding their appointment."

The Court hastens to add:

"Each case, as already observed, must depend largely upon its special facts." (So. Ry. v. Carnegie S. Co., *supra,* at p. 292.)

In the Carnegie Steel case, the supplies held to be for current repairs were rails sold the Richmond & Danville Railroad Company. This company owned and controlled more than twenty other railroads of other corporations, with the total of over three thousand miles of tracks. The supplies so furnished were used in part by the Richmond and Danville Railroad. The remainder was used upon three or four other of its controlled roads. Other complications also appear in the statement of the case.

The Court continues:

"In some cases the courts, in their administration of [60] railroad property by receivers, have refused to give priority to unsecured claims that did not accrue within six months immediately preceding the appointment of receivers. *Such a rule will do full justice in . . most cases to creditors who are entitled to look*

to current receipts for the payment of current debts. But no absolute rule on the subject has been prescribed by statute or by judicial decisions. A claim accruing back of the six months immediately preceding the appointment of a receiver may, *under the circumstances of particular cases,* be accorded the same priority in the distribution of earnings that belongs to like claims arising within that period. Touching this question of time and the principles upon which the equitable rights of creditors in such cases as this rest, Mr. Justice Brewer said, in Blair v. St. Louis etc. Railway Co., 22 Fed. Rep., 471, 474: 'The idea which underlies them I take to be this: that the management of a large busines, like that of a railroad company, cannot be conducted on a cash basis. Temporary credit, in the nature of things, is indispensable. Its employes cannot be paid every month. It cannot settle with other roads its traffic balances at the close of every day. Time to adjust and settle these various matters is indispensable. Because, in the nature of things, this is so, such temporary credits must be taken as assented to by the mortgagees . . . In this view, such temporary credits accruing prior to the appointment of the receiver must be recognized by the mortgagees and such claims preferred. Now, for what time prior to the appointment of a receiver may these credits be sustained? There is no arbitrary time prescribed, and it should be only such reasonable

time as, in the nature of things and in the ordinary course of business, would be sufficient to have such claims settled and paid. *Six months is the longest time I have noticed as yet given. Ordinarily, I think that is ample. Perhaps,* in some large concerns, with extensive lines of road and *a complicated business, a longer time might be necessary:'* " (at 292)

The italics are those of this Court.

The effect of the Court's reasoning is that the largeness of the concern, its extensive lines and complicated business, rendered a longer time than six months reasonable for the adjustment and settlement of its current account,—doubtless, taking into consideration that it would be necessary, in the ordinary course, for the Richmond and Danville Railroad to have a settlement with its controlled lines and receive from them the money for the rails used by each system before settling with claimant. Other reasons for the six months rule are stated in Westinghouse Air Brake Co. v. Kansas City So. Ry. (173 Fed., 26.)

Intervenor contends that the six months rule was not considered by the Court in Moore v. Donahoo (217 Fed., 177. In [61] this case the receiver was appointed December 6, 1903.

"The master found (and the correctness of the finding is not questioned) that the claims which accrued during the period of six months immediately preceding the appointment of the receiver—that is, from June 1, 1909, to Decem-

ber 6, 1909—on account of labor done and materials furnished in the ordinary course of business, and for the normal maintenance and operation of the railroad, and which it was reasonable to expect would be paid out of the current operating income, aggregated $48,571.-42. * * *

"The master held that all of the claims were preferential in character." (at pp. 179 & 180)

The District Court confirmed the master's report.

In answering appellant's contention that the mortgagee was only bound, if at all, to restore income diverted after the preferred claims became due, and was not obliged to restore income appropriated to the mortgagee's benefit prior to the maturity of the preferred claims, and in distinguishing the cases cited by appellant in its contention, the Court says:

"But here, as is the general rule, the courts must be understood as having spoken with reference to and in the light of the facts they had under consideration, and there is no very close analogy between some of the cases and the one at bar. In the first one cited, it may be pointed out that there was but a single intervention, and that the intervenor sought to take advantage of diversions antedating the preferential period. While, as a matter of strict logic, these distinctions may not be controlling, still it is apparent that the court had no reason to consider, and probably did not consider, the

practicability or propriety of applying the rule relied upon to a case like the present one, where the task of marshaling the numerous claims with reference to diversions, and calculating the distributive share to which each is entitled, would be extremely difficult if not impossible. In the Central Trust Company Case there were but three intervenors, and it is not clear that the diversion was within the preferential period. In each of the other cases there was but one intervention, and in at least one of them the diversion relied upon was prior to the six months period. * * * Whatever standard may be employed in the case of an isolated claim in relation to an isolated diversion, it is thought that, at least in cases where the claims are numerous and the accounts current, the rule contended for would not only be difficult of application, but inequitable as well, and that some period must be adopted as a unit, during which all claims are to be deemed to constitute a single group and have the same footing. We agree with the court below in adopting the preferential period as such unit, and in holding that presumptively the current revenues thereof are applicable to the current debts, and that in case of a diversion restoration may be decreed for the common benefit of the entire group." (at p. 186) [62]

The Court, in the foregoing case, for the purpose of fixing a diversion period, adopted the preference period, treating the latter as a well recognized

period of six months. The "standard" the Court was striving to fix was one for the period during which diversion of current income would be required to be restored; but the court recognized, approved and so plainly adopted the six months preferential period as to leave this court no other course than to so hold.

The Court could not in that case adopt it for one purpose, without adopting it for the other, for, if the preferential period is not adopted, then the diversion period has nothing to rest upon. It is undoubtedly true that the two chief questions considered by the Court in Moore v. Donahoo (127 Fed., 177) were whether the Court would adopt the net income rule, or the going concern rule, concerning which the courts have been divided, and the further question as to whether there had been a diversion. But, in ruling upon the latter question and in fixing the time in which money expended for the benefit of the mortgagee would be considered a diversion, it fixed such time, in that case and in all cases, in the absence of unusual circumstances as the preferential period; to wit, six months.

While the question was not squarely before the Court, the continued recognition by the Supreme Court of the six months rule is shown by the following from the dissenting opinion in Gregg v. Metropolitan Trust Company (197 U. S. 183, at 196):

> "But recognizing that there must be some limitation of time, the courts have fixed six

months as the period within which preferential claims may accrue."

At the time of the decision in New York Guar. & Indem. Co. v. Tacoma Ry. & M. Co. (83 Fed., 365), the six months' rule was not as firmly established as at the present time, yet, even in that case the preferential period was not enlarged to the extent that would be necessary to include the intervenor's claim in [63] the present case. In that case a cable was sold to the mortgagor October 24, 1892. Suit was brought by claimant for its value October 5, 1893, less than a year after its claim accrued. True, a receiver was not appointed until December 24, 1894, but claimant did not recover judgment in his suit until 1896, and the Court refused to consider the time as running against claimant, after the starting of its suit for, by bringing suit, it was exercising all requisite diligence.

Westinghouse v. Kansas City, So. Ry. Co., 137 Fed., 26;

34 Cyc., 363, "D."

In Bellingham Bay Imp. Co. v. Fairhaven Ry. Co. (17 Wash., 371, at 375) the Court says:

" 'There is no fixed rule barring preferential debts contracted more than six months before the appointment of the receiver. There is no "six months' rule." ' " (Quoting from Farmers' Loan & Trust Co. v. Kansas City, W. & N. W. R. Co., 53 Fed., 132.)

"Upon principal, it would seem but just that a party should, in the absence of special circumstances of controlling importance, be entitled

to equitable relief for the full period in which, according to the statute, an action might be maintained at law to enforce the demand. If the lapse of three years is necessary under the statute to bar the debt, there appears to be no sufficient reason, generally speaking, why the equitable right should be barred within a shorter period."

The Supreme Court in Southern Ry. v. Carnegie Steel Company (176 U. S., 257, at 292) said:

"In some cases the courts, in their administration of railroad property by receivers, have refused to give priority to unsecured claims that did not accrue within six months immediately preceding the appointment of receivers. Such a rule will do full justice in most cases to creditors who are entitled to look to current receipts for the payment of current debts. But no absolute rule on the subject has been prescribed by statute or by judicial decisions. A claim accruing back of the six months immediately preceding the appointment of a receiver may, under the circumstances of particular cases, be accorded the same priority in the distribution of earnings that belongs to like claims arising within that period."

It, therefore, appears that the Supreme Court, whose decisions bind this Court, said that special circumstances are necessary to take a case out of the six months' rule, whereas [64] the Washington Supreme Court says that special circumstances are

necessary to take a case out of the general Statute of Limitations.

Counsel for intervenor urges as special circumstances justifying the enlarging of the preferential period beyond six months: That the material furnished by intervenor was the means of saving to the mortgagor certain of its franchises. While the mortgagor was required by the municipal authorities to make the repairs and construction into which the material furnished by intervenor entered, yet it is not clearly established that, but for that work, the franchises would have been forfeited or new franchises would not have been granted.

Further, viewed in one way, the greater part of that which is done by a public service corporation—its ordinary operation—is necessary to preserve its franchise, yet it affords no particular reason to relax the rule of diligence required on the part of materialmen.

Counsel further contends that the preferential period should be enlarged because of the diversion of current income to the payment of interest on the bonds. While such division has been considered sufficient to warrant the payment of materialmen out of the proceeds derived from the payment of the *corpus* of the property, no case has been called to my attention where it has been held sufficient to warrant an enlargement of the preferential period.

If the current income had been lost or wasted, or had been paid to other materialmen or workmen for other repairs, the effect upon intervenor would

gage bondholders of Washington-Oregon Corporation to the extent of $56.03, and that the whole of the remainder of said claim be denied such preference, and it is by the Court [67]

FURTHER ORDERED, ADJUDGED AND DECREED that the temporary receiver pay said sum of $56.03 from funds now in his hands together with all costs incurred by the intervenor in this action.

Done in open court this 10th day of February, 1916.

EDWARD E. CUSHMAN,
Judge.

(Filed Feb. 10, 1916.) [68]

Petition for Appeal.

To the Honorable EDWARD E. CUSHMAN, Judge of Said Court:

The above-named intervenor, Crane Co., feeling aggrieved by the decree rendered and entered in the above-entitled cause on the 10th day of February, 1916, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the Assignments of Error filed herewith, and prays that this appeal be allowed and that citation be issued as provided by law, and that a Transcript of the Record, proceedings and documents upon which said decree was based, duly authenticated be sent to the United States Circuit Court of Appeals for the Ninth Circuit under the rules of said Court in such cases made and provided.

And your petitioner further prays that a proper order relating to the Bond on Appeal be made herein.

MAURICE W. SEITZ,
Solicitor for Intervenor, Crane Co.

(Filed Feb. 28, 1916.) **[69]**

Order (Allowing Appeal).

Upon motion of Maurice W. Seitz, solicitor and counsel for Crane Co., Intervenor, herein,

IT IS HEREBY ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree heretofore filed and entered herein be and the same is hereby allowed, and that a certified Transcript of the Record, exhibits, stipulations and proceedings be forthwith transmitted to said United States, Circuit Court of Appeals for the Ninth Circuit.

IT IS FURTHER ORDERED that the Bond on Appeal be and it is hereby fixed at Five Hundred Dollars.

Dated this 28 day of Feb., A. D. 1916.

JEREMIAH NETERER,
Judge of the U. S. District Court for the Western District, Southern Division.

(Filed Feb. 28, 1916.) **[70]**

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, that we, Crane Co., as Principal and United States Fidelity and Guaranty Company, as Surety, are

held and firmly bound unto the complainant above-named in the sum of Five Hundred ($500.00) Dollars, lawful money of the United States to be paid to them and their respective executors, administrators, successors and assigns, to which payment well and truly to be made, we bind ourselves, our successors and assigns jointly and severally by these presents.

Sealed with our seals and dated this 2d day of March, A. D. 1916.

WHEREAS, a decree was rendered on the 10th day of February, 1916, in the above-entitled cause against the intervenor, Crane Co., and in favor of the complainant and receiver herein disallowing the prayer of the petition of the said Crane Co. and

[71]

WHEREAS, said intervenor, Crane Co., is prosecuting an appeal in the United States Circuit Court of Appeals for the Ninth Circuit to reverse said judgment and decree of said United States District Court for the Western District of Washington, Southern Division.

NOW, THEREFORE, if the above-named Crane Co., shall prosecute its said appeal to effect and answer all costs if it fail to make good its plea, then this obligation shall be void; otherwise to remain

in full force and effect.

CRANE CO.
By E. H. HOBBS,
Cashier,
Principal.

UNITED STATES FIDELITY AND GUARANTY COMPANY. [Seal]
By DOUGLAS R. TATE,
Its Attorney in Fact,
Surety.

Approved 3–7–16.
JEREMIAH NETERER,
Judge.

(Filed Mar. 4, 1916.) [72]

Assignments of Error.

Comes now Crane Co., intervenor herein and files the following Assignments of Error, upon which it will rely in its prosecution of its appeal in the above-entitled cause from the decree made by this Honorable Court on the 10th day of February, A. D. 1916:

I.

That the Court erred in making the following Finding in said decree: "That there is no equity in the claim of the intervenor for preferential payment over the claims of the mortgage bondholders, except to the extent of Fifty-six ($56.03) and 3/100 Dollars, and that with the exception aforesaid the claim of the intervenor is inferior to the claims of the mortgage bondholders, and only entitled to payment subsequent thereto." [73]

II.

That the Court erred in adjudging and decreeing that the intervenor, Crane Co., be allowed preferential payment over the claims of the mortgage bondholders only to the extent of Fifty-six and 3/100 ($56.03) Dollars.

III.

That the Court erred in denying the intervenor, Crane Co., preferential payment over the claims of the mortgage bondholders except to the extent of Fifty-six and 3/100 ($56.63) Dollars.

IV.

That the Court erred in failing and refusing to hold that the intervenor, Crane Co., was and is entitled to preferential payment over the claims of the mortgage bondholders to the extent prayed for in its amended petition of intervention.

V.

That the Court erred in refusing to hold and decree that the intervenor, Crane Co., was and is entitled to preferential payment over the claims of the mortgage bondholders to the extent of the amount prayed for in its amended petition of intervention, to wit, Eleven Thousand One Hundred Forty-six and 67/100 ($11,146.67) Dollars.

VI.

That the Court erred in refusing to hold and decree the intervenor herein entitled to the relief prayed for in its amended petition of intervention.

MAURICE W. SEITZ,
Solicitor for Intervenor, Crane Co.

(Filed Mar. 4, 1916.) **[74]**

Stipulation (as to Original Exhibits, etc.).

IT IS HEREBY STIPULATED by and between the parties to the above-entitled cause that the original exhibits (inclusive of the exhibits attached to the stipulations) shall be transmitted with the records in the above-entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit and that the original exhibits need not be printed.

IT IS FURTHER STIPULATED AND AGREED in addition to the receiver's reports attached to the original stipulation as exhibits, that at the close of the said receivership, and at the time of the hearing of the above case in the United States District Court for the Western District of Washington, Southern Division, the receiver had in his possession the sum of $23,091.44, representing net earnings from said receivership. No interest was paid during the receivership upon the so-called first and consolidated mortgage, amounting to $1,569,000, or the second mortgage, amounting to $400,000.

RANDOLPH W. CHILDS,
HAYDEN LANGHORNE & METZGER,
MAURICE W. SEITZ,
Attorney for Intervenor, Crane Co.

(Filed Mar. 11, 1916.) [75]

[Certificate of Clerk, U. S. District Court to Transcript of Record.]

CLERK'S CERTIFICATE.

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return the foregoing and attached to be a full, true and correct transcript of the papers and proceedings in the case of Fidelity Trust Company, Trustee, vs. Washington-Oregon Corporation, et al., Crane Co., Intervenor, No. 15–E. lately pending in this Court, pursuant to the stipulation of counsel filed herein, as the originals thereof appear on file in this Court at Tacoma, in the District aforesaid.

I further certify that I have attached hereto the original Citation issued in the said cause, and that pursuant to stipulation herein filed, I am transmitting under separate cover and certificate the original exhibits introduced in said matter.

I further certify that the following is a full, true and correct statement of all expenses, costs, fees and charges incurred and paid into my office by and on behalf of the appellant herein, for making the record, certificate and return to the United States Circuit Court of Appeals, to wit:

Clerk's fees (Sec. 828 R. S. U. S.) for making, record, certificate and return, 182 folios @ 15¢ ea.....$27.30

Clerk's certificate to transcript, 2 folios and seal ..... .50
Clerk's certificate to exhibits, 2 folios and seal..... .50

[76]

ATTEST MY OFFICIAL SIGNATURE AND THE SEAL OF THIS COURT this 25th day of March, A. D., 1916.

[Seal] FRANK L. CROSBY,
Clerk.
By E. W. Ellington,
Deputy Clerk. **[77]**

In the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

CRANE CO., a Corporation,
Appellant,
vs.
FIDELITY TRUST COMPANY, Trustee, a Corporation, and WASHINGTON-OREGON CORPORATION, INDEPENDENT ELECTRIC COMPANY, a Corporation, and WILLIS D. HOAG,
Appellees.

Citation [on Appeal].

The United States of America,
Western District of Washington,—ss.
To Fidelity Trust Company, Trustee, Washington-Oregon Corporation, Independent Electric Company, a Corporation, and Willis D. Hoag, Appellees, Greeting:

You are hereby cited and admonished to be and

appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, California, on the 25th day of April, 1916, next, pursuant to an appeal allowed and filed in the clerk's office of the United States District Court for the Western District of Washington, Southern Division, wherein Crane Co., a corporation, is appellant, and you are the appellees, to show cause, if any there be, why the decree rendered against said appellant, as in said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States of America, this 25th day of March, A. D. 1916, and of the Independence of the United States of America, the one hundred and fortieth.

[Seal] JEREMIAH NETERER,
United States District Judge for the Western District of Washington.

Service of the within Citation by receipt of copy thereof acknowledged this 25th day of March, A. D. 1916.

RANDOLPH W. CHILDS,
MAURICE A. LANGHORNE,
F. D. METZGER,
Solicitors for Appellees.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals, for the Ninth Judicial Circuit. Crane Co., a Corporation, Appellant, vs. Fidel-

ity Trust Company, Trustee, etc. et al., Appellees. Citation.

[Endorsed]: No. 2768. United States Circuit Court of Appeals for the Ninth Circuit. Crane Company, a Corporation, Appellant, vs. Fidelity Trust Company, Trustee, a Corporation, and Washington-Oregon Corporation, Independent Electric Company, a Corporation, and Willis D. Hoag Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed March 28, 1916.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.